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In the Supreme Court of the United States.

October Term, A. D. 1903.

No. 1249.

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THE CRESEDE & CRIPPLE CREEK MINING AND MILLING COMPANY, Petitioner,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Respondent.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF THE PETITIONER.

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STATEMENT.

On June 19, 1897, the petitioner herein began its action against the respondent herein by filing its complaint in the District Court of El Paso county, Colorado, in ejectment and for equitable relief. On July 6 following the respondent removed the cause to the Circuit Court of the United States for the District of Colorado. On December 22, 1899, it was

transferred to the law side of the docket, and on January 4, 1900, the petitioner filed its complaint in ejectment therein. On February 10, 1900, the respondent filed its answer, and on June 25, 1901, the petitioner attacked a great part of it by motion to strike for irrelevancy, redundancy, immateriality and insufficiency, which motion was sustained on December 6 following. The cause was tried on January 29, 1902, and verdict and judgment given for plaintiff and petitioner. Respondent sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit, by which the judgment was reversed on the 18th day of November, 1902. Thereupon the petitioner applied to this court for a writ of certiorari to the Court of Appeals, which was duly awarded, and the decision of that court is thereby made the subject of review.

The petitioner is the owner in fee of the Little Mary and Ocean Wave lode mining claims in the Cripple Creek district, Teller county, Colorado, which were discovered and located on January 2, 1892. A patent was duly applied for, under which application the claims were entered at the Pueblo land office on August 5, 1893, and patent was afterwards and on December 21, 1893, issued to petitioner upon such entry.

On February 25, 1892, Mason, Hall and Teitja filed for record a location certificate of the Uinta Tunnel claim, fixing the 18th day of February, 1892, in the certificate as the date of its location (exhibit F, page 150, Transcript). The affidavit of Hall appended to the certificate recites that on January 13, 1892, he and his associates located the tunnel site by

posting a notice at its entrance (page 151). This circumstance doubtless caused the respondent to allege January 13, 1893, in its answer, as the date of the tunnel location instead of the date recited in the certificate. The discrepancy, if it be one, is of no practical importance, since the petitioner's lode claims are senior in location to the tunnel site whether the one or the other of the two dates is accepted.

The line of this tunnel is thrown across the Little Mary and Ocean Wave claims, its portal being 550 feet west of the Ocean Wave westerly side line, and 1,175 feet west of the Little Mary east side line. The remainder of its course is wholly to the east of petitioner's premises, but accessible only through them. In August following the tunnel location its owners located a lode claim called the Uinta Tunnel No. 1 claim, using the portal of the tunnel as the point of discovery and extending in a general northerly and southerly direction from it (Transcript, page 154). As this location was not pleaded and does not conflict with the petitioner's claims, the object in offering the certificate of location in evidence is not apparent.

The respondent and its grantors drove the tunnel through and underneath the petitioner's lode claims a distance of 1,175 feet from its portal. They continued it for a further distance of 756 feet, or 1,931 feet from its portal, at which point respondent avers that the tunnel encountered a blind vein not theretofore known and "a cross lode to any lode ever uncovered or discovered in said territory by any person or persons" (Transcript, pages 45, 65). This cross

lode "is at the present time disclosed and uncovered and appears in the breast of said tunnel running almost parallel with its course" (Transcript, pages 46, 66). As the tunnel is alleged to have been driven a total distance of 2,200 feet at the time of the filing of the answer, it appears throughout the last 269 feet of the bore. The pleading does not inform the court when this cross lode was discovered, but exhibit A fixes it on December 18, 1897, although claiming it by relation back to January 13, 1892, as of the date of the tunnel location (Transcript, page 143). The certificate was filed for record March 2, 1898. The location was christened the "Uinta Tunnel No. 23 lode." As its initial point is fixed in the certificate at 1,921 feet from the face of the tunnel, and extends therefrom north 50 degrees 30 minutes, west 300 feet, and south 50 degrees 30 minutes, east 1,200 feet, it does not touch the petitioner's claims, its nearest end being 446 feet to the east of them.

It is averred that when the tunnel reached the distance of 2,102 feet from its portal, or 171 feet beyond its exposure of No. 23 lode, it disclosed and uncovered another vein, also hitherto unknown and undiscovered (Transcript, pages 47, 48, 67, 68). This lode it located by certificate as "Uinta Tunnel No. 24 lode." Its date of discovery is given as December 23, 1897, and the certificate was filed for record on March 2, 1898 (Transcript, exhibit C, page 145). The initial point of the lode is fixed at 2,102 feet from the face of the tunnel, from which point it is extended 750 feet south, 79 degrees east and 750 feet north, 79 degrees west. Its discovery point is therefore within the boundaries of claim No. 23 and much of its ter-

ritory is the same. Its nearest boundary line, however, is 177 feet easterly from petitioner's claims, and so there is no conflict between them.

The tunnel being driven onward intersected a third cross lode 2,118 feet from its face, or 187 feet beyond lode No. 23, and 16 feet beyond lode No. 24. The character of the last vein and its unknown quantity were precisely like its forerunners, and therefore it was located as "Uinta Tunnel No. 25 lode" (Transcript, pages 48, 50, 69, 70). The location certificate dates its discovery on January 6, 1898, and was filed for record March 2, 1898. The initial point of discovery is fixed at 2,118 feet from the face of the tunnel and it extends therefrom 750 feet north, 26 degrees 15 minutes west and 750 feet south, 26 degrees 15 minutes east (Transcript, pages 146, 147). The discovery is therefore within the lines of lodes Nos. 23 and 24, and its exterior lines embrace a considerable part of the premises covered by them. Its nearest boundary line is 193 feet easterly from the petitioner's claims and therefore does not encroach upon them.

Continuing with the tunnel the respondent encountered still another vein at a distance of 2,180 feet from its portal. This vein, similar in all respects as to character and previous knowledge of its existence, was disclosed 249 feet from lode No. 23, 78 feet from lode No. 24 and 62 feet from lode No. 25. It was located and christened "Uinta Tunnel No. 26 lode" (Transcript, pages 50, 51, 71, 72). Although further into the mountain than the others the location certificate recites that it was discovered on December 15, 1897, and the certificate was recorded March 2 following. The initial point is fixed at 2,181 feet from

the tunnel face, from which it extends 1,000 feet north, 11 degrees 45 minutes west and 500 feet south, 11 degrees 45 minutes east (Transcript, pages 48, 49). Its discovery point is therefore within the boundaries of its three forerunners, and its nearest boundary line is not less than six feet to the east of petitioner's claims, hence there is no conflict.

These four veins constitute the sum total of all of respondent's alleged tunnel discoveries. It declares, however, that one Carothers, on January 13, 1897, discovered and located the Black Jasper lode claim, which he afterwards sold and conveyed to the respondent. That "its tunnel enters said Black Jasper lode as aforesaid about 2,250 feet from the mouth or portal thereof and continues along and through said Black Jasper lode to the breast thereof" (Transcript, pages 53, 74).

It is not pretended that the Black Jasper was discovered by the respondent through its tunnel or at all, or that its location or the location of any of its other discovered veins are in any wise in conflict with the petitioner's Little Mary and Ocean Wave lode claims. But it is asserted in the answer that the respondent has the right under the federal laws to enter through and underneath the petitioner's premises and penetrate them with its tunnel, that it may gain access to and develop the claims it located, and that which it purchased lying beyond them. It also claims this right by some undefined species of prescription or estoppel, because it asserts that petitioner permitted it to run its tunnel through the Ocean Wave and Little Mary claims without objection. (Transcript, pages 43, 44, 51, 53.) To empha-

The references to Transcript of Record contained herein are to the original transcript.

size its contentions, it closed its answer with a prayer for relief and asked for judgment

"that it may have the right to use and operate its said tunnel through the said patented Ocean Wave and Little Mary lodes and lode mining claims as said tunnel is now constructed and operated."

"That the defendant has the right to mine and extract ore by it uncovered in said Uinta Tunnel No. 23 lode, Uinta Tunnel No. 24 lode, Uinta Tunnel No. 25 lode, and Uinta Tunnel No. 26 lode, and to haul the same through its said tunnel through, across and along said Ocean Wave and Little Mary lodes and lode mining claims as the same are now penetrated by the said tunnel." (Transcript, page 53.)

In the first division of its answer, being that portion which is directly responsive to the averments of the complaint, the respondent admitted the patent of the petitioner to its mining claims, but alleged that it

"was not obtained or issued in pursuance of the statutes of the United States which provides for the issuance of patents and that such patent is and should be wholly null and void. That said Ocean Wave and Little Mary lode mining claims were not nor were either of them located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered in the discovery shaft of said Ocean Wave lode mining claim, or of said Little Mary lode mining claim." (Transcript, page 40.)

It also denied

"that said patent relates back to or takes effect from the date of said alleged discovery and location for all purposes or for any purpose given or provided by the laws of the United States or of the State of Colorado; but it alleges that there never was at any time or by

any person, any location whatever made of said pretended Ocean Wave lode mining claim or of said Little Mary lode mining claim." (Transcript, page 41.)

These averments, together with all that part of the answer constituting an affirmative defense, were stricken out on motion filed in accordance with the *Code of Practice of the state of Colorado*, leaving the answer with its formal specific denials of the allegations of the complaint. The issues thus presented were met by the petitioner with proof of its patent title and certificates of location fixing the date thereof, which the defendant sought to overthrow by offering proof of the rejected portions of its answer, and these, with the judgment of the trial court and the opinion of his Honor, Judge Sanborn, of the Court of Appeals, make up the record of the case.

In sustaining petitioner's motion to strike out as immaterial and incompetent the bulk of the respondent's answer, the trial court obeyed the principle so many times declared, that a patent of the United States for real estate was the highest evidence of title, and could not be collaterally assailed or impeached. In rejecting testimony offered by the defendant tending to show the absence of a mineral discovery in the Ocean Wave and Little Mary claims, and the alleged discovery of blind veins elsewhere by driving its tunnel forward, the trial court was necessarily guided by its own action in sustaining the motion to strike, together with the law requiring such action; but was especially governed by the decision of this court in the case of The Calhoun Gold Mining Co. vs. Ajax Gold Mining Company, 182 U. S., 499. It was also influenced by the circumstance that the respondent

claimed merely the right of way through the petitioner's patented claims to reach discoveries it had made in other premises, and was not contesting for any vein, lode or ledge discovered or disclosed by the respondent's tunnel within the ground in dispute.

The Circuit Court of Appeals reversed the judgment of the trial court and remanded the cause for further proceedings in harmony with the opinion, upon the ground that because the respondent's tunnel claim was located before the petitioner's mineral claims had been entered for patent, the principles of the Calhoun-Ajax decision were not applicable, and the respondent should have been permitted to assail the integrity of the plaintiff's location by showing an absence of any discovery of a mineral vein in either or both of said claims prior to entry.

Thereupon, petitioner applied to this court for, and was granted, a writ of certiorari to review the decision of the Court of Appeals.

ERRORS ASSIGNED.

In its petition for the writ, the petitioner averred that the Court of Appeals did not follow the ruling and decision of this court, but rendered a judgment and decision in conflict therewith in four particulars, to wit:

"1. The tunnel of the respondent, as in the Calhoun-Ajax case, was not located until after the lode claims through which it was driven had been located, and though both of the lode claims had passed to patent long before this controversy arose, the United States Circuit Court of Appeals held, in violation of

the rule laid down in the Calhoun-Ajax case, that testimony might be introduced to show that at the time the tunnel location was made there had been no discovery of ore within the limits of the two claims, and by such testimony fix the date of the relation of the patents to the two claims not to the date of their location, as announced by this court, but to the date of the subsequent discovery of mineral therein. The trial court having refused to permit such proof to be made, the Court of Appeals has reversed the cause and remanded it to the Circuit Court for a new trial at which such testimony is to be admitted.

"2. That the said Circuit Court of Appeals ran counter to the decision of this court in its construction of Sections 2322 and 2323, Revised Statutes of the United States, in their relation one with the other, by holding in this case that notwithstanding a lode claim had passed to patent, nevertheless, its title was still subject to the right of way of any tunnel which was located prior to the location of the lode claim, or prior to the actual discovery of mineral therein, unless the claim had already been entered for patent in the land office.

"3. That the said Circuit Court of Appeals, in conflict with the rules of law laid down by this court, further held that notwithstanding the absolute grant by the patent of the United States to the claim owner of all veins of every description apexing within his lines, a tunnel claimant was entitled to enter and enjoy certain of them provided his tunnel was located prior to the location of the claim, or prior to the discovery of mineral therein, unless there had been an entry of the same for patent in the land office.

"4. That the Circuit Court of Appeals in this cause held and decided that if at the time of the entry of a lode claim for patent the rights of an adverse tunnel claimant were so uncertain, contingent and intangible as that they could not be fairly litigated he was not bound or concluded by the patent issued upon such entry."

These contentions may be summarized in the general charge that the Circuit Court of Appeals erred in its decision herein by refusing to accept and apply the decisions of this court to the case at bar, and by announcing and applying a doctrine in conflict therewith.

In the opinion His Honor Judge Sanborn emphasized what he considered to be a fundamental distinction between this and the case of the Calhoun Co. vs. Ajax Co., to wit: That in the case last mentioned the tunnel location of the Calhoun Company was junior to the entry of the Ajax Company's lode mining claims, while in the case at bar the respondent's tunnel site, though junior to the petitioner's lode locations, preceded their entry for patent. Upon this distinction alone he formulated his argument and reached his conclusion. But there is another feature of this case, not specially noticed by the court below, which distinguishes it not only from the Ajax case, but from all other cases, so far as we have been able to discover. It is essential, we think, to an intelligent discussion that this distinction should be borne in mind from the outset, since it seems to us to be of much greater importance than any other fact disclosed by the record. It is certainly much more serious than the one relied upon by His Honor Judge Sanborn, which should not have affected the rights of the parties. *We allude to the circumstance that the respondent contends for nothing as against the petitioner except the right of way through its claims.* The blind or cross lodes not appearing at the surface, and which are alleged to have been disclosed by their intersection with this tunnel, are all to the east of the premises of the petitioner.

Respondent has located a claim upon each of said discoveries, the exterior boundaries of every one of which, though conflicting with the others, do not encroach upon the petitioner's territory. It makes no claim to any vein, lode or ledge or the discovery or disclosure by the tunnel of any vein, lode or ledge whatever, blind, cross or otherwise, within the boundary lines of the plaintiff's patented premises, but avers that, because these premises lie between the portal or face of its tunnel and the veins it has discovered, it has a perpetual and everlasting thoroughfare or right of way through petitioner's territory for the convenient working and operation of said veins.

We have already alluded to respondent's alleged purchase of the Black Jasper location from one Carothers, and the intersection of its vertical boundaries by the tunnel about 2,250 feet from its mouth. The respondent also claims this right of way for the operation of its Black Jasper location, whose connection with the tunnel merely consists of the coincidence of its ownership by the respondent. In its printed argument in the court below, respondent said (page 6):

"The patented claims of the defendant in error lie between the portal of the tunnel and the blind lodes Nos. 23, 24, 25 and 26 and the Black Jasper claim, owned by the plaintiff in error and on the line of the bore of the tunnel between the portal of the tunnel and the claims as above enumerated, owned by the plaintiff in error. None of the blind lodes lie within the boundaries of the patented claims belonging to the defendant in error; *there is no controversy here in reference to the right of the defendant in error not only to the lodes on which they made their location and to which they have patent, but there is no claim to any blind lodes lying within the patented areas.*"

We have, then, at the outset an admission by the respondent, first, that there are no lodes in the petitioner's ground upon which its locations were made about which there is any controversy. Also, that the respondent makes no claim either to such lodes or to any lodes within the petitioner's patented areas. The effect, therefore, of the opinion of the Circuit Court of Appeals is that the owner of a tunnel site thrown across previously located mining claims, which are afterwards entered for patent and patented, may attack their integrity, notwithstanding the patent, by showing that no discovery of any vein had been made therein prior to the entry. He may do this, notwithstanding he has made no tunnel discovery within their boundaries for the mere establishment of a right of way through the same.

We respectfully submit that this decision is not only opposed to the doctrine of the Calhoun-Ajax case, but to every decision of this court and of every court in the land where the conclusiveness or validity of a land patent of the United States was involved. Its importance as a precedent, especially when the high character of the court and the great ability of the distinguished jurist pronouncing the opinion are considered, can not be over-estimated. Hence a full analysis of its premises is justified, notwithstanding its erroneous character seems obvious.

Its discussion embraces the propositions: First, the relation of the proofs offered by the respondent to the allegations of its pleadings. Second, the nature and extent of the grant embraced in a patent of the United States for lode mining claims. Third, the effect of Judge Sanborn's decision upon such rights;

and, finally, the conflict of that decision with those previously announced by this court.

I.

THE RELATION OF THE PLEADINGS TO THE PROOFS OFFERED.

In the last paragraph of his decision Judge Sanborn says:

> "The averments that no discoveries of mineral in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant and its evidence to sustain them should have been received."
>
> 119 Fed., 171.

There is no such averment in the answer, either as originally filed or as subsequently reformed through the motion to strike, as mentioned by the court. The answer never contained any general denial. Those which were permitted to remain on file denied by paragraph 4 that the plaintiff ever was the owner in fee of the Ocean Wave and Little Mary claims, but it admits that the plaintiff by some means obtained an alleged patent for said claims (Transcript, page 40). Also paragraph 5, that the said mining claims *were not discovered or located at any time by J. W. Winchell and E. W. M. McNeal, or either of them, or by any person.*

That part of the fourth paragraph of the first division of the answer which was stricken out alleged that the petitioner's patents were not obtained or is-

sued in pursuance of the statutes of the United States providing therefor, and were therefore null and void. Also that the said claims were not, nor were either of them, located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered or uncovered in the discovery shaft on said Ocean Wave or Little Mary claims. That part of the fifth paragraph of the first division of the answer which was stricken out denied that the patent related back or took effect from the date of said alleged discovery for all purposes or for any purposes, and alleged that there never was at any time by any person any location whatever of the pretended Ocean Wave or Little Mary lode mining claims. That part of the affirmative answer, upon the allegations of which an affirmative judgment was prayed by the respondent, makes no reference to the petitioner's location or discovery, but pleads its own title to the tunnel and to the veins discovered therein, together with a right of way through petitioner's mining claims under the federal and state statutes for the operation thereof.

It can not be successfully contended that the denial that the plaintiff was ever the owner in fee of its claims, that it obtained its patent by fraud, that neither of these claims were ever located at any time by any person, and that neither of them was ever located upon discovery vein or veins, or that no mineral vein whatever was ever discovered in either of them, is equivalent to an averment that the plaintiff had never made any discovery of mineral in place within its claims before the location of the tunnel site. The difference between such averments is obvious. Indeed, the averment, which the Court of Appeals as-

sumed to be, but which was not in the record, of a lack of discovery prior to the tunnel location, would have involved an admission of discovery subsequent to such location. The respondent, if its averments were good, would have been at liberty to show no discovery whatever at any time either before or after the patent, which, of course, could not be done even under His Honor Judge Sanborn's opinion.

It is possible that if the answer had contained a general denial of the allegations of the plaintiff's complaint, a liberal construction would have justified the statement quoted from the opinion; but even that, as we have seen, is absent from the answer. As a question of pleading, therefore, and without reference to any other consideration, testimony concerning the want of discovery in the plaintiff's claims was properly rejected.

Reynolds vs. Stockton, 140 U. S., 254.
Munday vs. Vail, 34 N. J. L., 418.
Hicks vs. Mundy, 43 Cal., 522.
Tucker vs. Parks, 7 Colo., 68.
Miller vs. Hallock, 9 Colo., 551.

II.

ESTATE GRANTED BY PATENT FOR LODE MINING CLAIMS.

The character and extent of the estate conveyed by a mineral land patent have been the subject of such frequent judicial construction and comment, that it seems strange that at this day any question affecting

them can arise, or that any more than passing reference to the doctrine were necessary. In the case of Eureka Co. vs. Richmond Co., 4 Sawyer, 302, Mr. Justice Field said:

"A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences."

The same distinguished jurist, in Smelting Co. vs. Kemp, 104 U. S., 646, said:

"A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

In Iron Silver M. Co. vs. Campbell, 17 Colo., 267, the Supreme Court of Colorado, following the decisions of this court, declared that there could be no higher evidence of title than a patent from the United States. In favor of the validity and integrity of such an instrument, it must be presumed that all antecedent steps necessary to its issue were duly taken.

And the rule has been established that a title conveyed by a mining patent relates back to the location which is its foundation as the inception of the right, and cuts off all intervening rights and surface

conflicts not raised and decided adversely to its holder prior to its issuance; a rule forcibly emphasized in the Calhoun-Ajax case.

Heydenfeldt vs. Daney, 93 U. S., 634.

Talbott vs. King, 6 Mont., 76.

Deffenbach vs. Hawke, 115 U. S., 392.

Kahn vs. Old Tel. Co., 2 Utah, 174.

Silver Bow M. Co. vs. Clark, 5 Mont., 318.

Argentine M. Co. vs. Terrible M. Co., 122 U. S., 478.

Deno vs. Griffin, 20 Nev., 249.

Davis vs. Weibbold, 139 U. S., 507.

United States vs. Iron Silver M. Co., 128 U. S., 673.

Montana Central Ry. Co. vs. Migeon, 68 Fed., 811.

Harkrader vs. Carroll, 76 Fed., 474.

Doe vs. Waterloo M. Co., 70 Fed., 455.

Controversies arising in the Ninth Circuit between the owners of lode mining claims having no conflict of surface boundaries and relating to the union or crossing of veins of their respective locations in their downward direction, have induced the Court of Appeals for that circuit to recognize the right of the respective claimants under such circumstances to show by extraneous evidence the date of the actual discovery of the veins in the respective locations. The doctrine as stated by Mr. Lindley, volume 2, section 783, is as follows:

"Where there is no surface conflict, the prior locator would have no standing as an adverse claimant

in patent proceedings instituted by a junior locator. An asserted intersection of veins not involving such conflict is not the subject of the adverse proceeding. In cases of this character, for the purpose of showing the date to which the patent relates, evidence is admissible to prove proceedings under which the title originated. This is not inconsistent with the doctrine as to the conclusiveness of a patent. There is no attempt to impeach that instrument."

The principal cases involving this doctrine are:

Bunker Hills and Sullivan Co. vs. Empire State, 109 Fed., 538, and 114 Fed., 420.

They are founded upon the decision of this court in the case of St. Louis Co. vs. Kemp, 104 U. S., 646, and proceed upon the theory that priority of discovery determines the right to uniting veins below the point of union; that an adverse upon application for patent is only possible where there is a conflict of surface boundaries, and the owner of such a location is not concluded by his adversary's patent, but can, notwithstanding such patent, prove an earlier discovery, notwithstanding the date of his adversary's location, and thereby bring himself within the exceptions expressly recited on the face of the grant. Without discussing or challenging the soundness of this doctrine, it may be stated that the conclusiveness of a patent is not inconsistent with the right of the patentee to show the date of the original proceeding for the acquisition of title, for the purpose of making one of its exceptions operative. The learned justice delivering the opinion in the Kemp case, confines the right to show the period of time in which a

patent may be said to take effect to instances where the date of the original proceeding is not stated in the instrument, and to conflicts of surface locations between junior and senior patents, and with the latter to an initiatory entry. The precise question presented in the Idaho cases has not been determined by this court. By section 2336, Revised Statutes United States, the "prior location" is given the vein below the point of union and the "subsequent location" the right of way through the space of intersection. It would seem from a casual reading of the statute that priority of location would be a conclusive test of ownership under the conditions assumed, but we have stated the doctrine as of interest here only as it seemingly relates to a departure from the salutary principle that seniority of location governs, and that a patent duly issued is conclusive evidence of such location. It does not affect the question under discussion.

The Colorado courts, both state and federal, held for a time that a patent to a lode claim did not embrace what are called cross-veins—that is, veins which on their strike traverse the discovery vein and in whole or in part cross the claim. This doctrine was based upon the supposed conflict between sections 2322 and 2336, Revised Statutes United States, and was the result of an effort to reconcile them. Since the decision by this court in Del Monte M. and M. Co. vs. Last Chance M. and M. Co., and Calhoun Co. vs. Ajax Co., that doctrine has been completely overthrown. In view of the previous decisions of this court in Iron Silver M. Co. vs. Elgin M. Co., and King vs. Amy & Silversmith M. Co., and of the evi-

dent application of section 2336 to veins uniting or intersecting on their dip only, it is somewhat remarkable that such an interpretation was ever applied to the operative clauses of a mineral patent.

In the case of Enterprise M. Co. vs. Rico-Aspen Co., and Campbell vs. Ellett, 167 U. S., 108 and 116, it is held that a tunnel owner discovering a vein in a tunnel has the right to appropriate 1,500 feet in length upon it; that the right rests upon the discovery of the vein, and dates back by relation to the time of the location of the tunnel site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire; and is not destroyed or impaired by the failure of the owner of the tunnel to adverse a previous application for a patent to a lode claim along the tunnel location before the discovery of the vein. This is due to the fact that the time in which the adverse proceedings could be waged had passed, and a present, tangible and certain right and not a mere possibility must exist as the basis of an adverse proceeding. The necessary inference is, that if at the time of the application for patent by the owner of a lode crossed by the tunnel, there is a present certain and tangible right, such right must be protected by the exercise of the right to adverse, and such is Mr. Lindley's conclusion.

2 Lindley on Mines, Sec. 726.

Such, also, would seem to be the reasonable deduction from all of the authorities upon the subject.

Back vs. Sierra Nevada Co., 2 Idaho, 386.

Mining Co. vs. Brown, 11 Mont., 370.

The rule is subject to the additional qualification that a tunnel location must have preceded that of the lode claim which it intersects. These conditions were presented in the cases cited, and, indeed, that must be so or they would of necessity yield to the last declaration of this court upon the subject in the Calhoun-Ajax case, a discussion of which is more appropriate hereafter.

Subject, therefore, to the principle involved in the Idaho and Rico-Aspen cases, neither of which is pertinent to the facts in controversy, we feel safe in asserting that up to the time of the decision of this case by the Circuit Court of Appeals, the rule was fully established and universally recognized that the title conveyed by mining patent relates back to the inauguration of the right, that is to the location upon which the patent proceedings are based, or, as well expressed in Barringer and Adams on Mines, page 417:

"The patent being simply the evidence of the grant, when it has been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights."

To this rule the Court of Appeals announces an exception in favor of tunnel claimants whose location is younger than the entry of a patented lode claim which it intersects. His Honor, Judge Sanborn, invokes the doctrine of the Rico-Aspen case as his support, and seeks to distinguish the Calhoun-Ajax case from the one at bar. We respectfully contend that the first does not sustain his decision, while the last is practically identical with the facts here presented,

apart from the non-discovery of any blind veins within the disputed premises.

III.

THE COURT OF APPEALS' DECISION.

It is difficult to analyze and comment upon this opinion in detail without quoting the whole of it, but to do this might exhaust the patience of the court, and we shall therefore endeavor to state its substance, quoting those portions only which deserve especial attention. His Honor, Judge Sanborn, states the principal question to be:

> "When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site open to determination by means of evidence or testimony *dehors* the patents?"

We have already called attention to two circumstances seriously affecting the existence of the question formulated by the learned judge, the first relating to the condition of the pleadings and the second to the absence within the premises of the petitioner of any vein discovered by the respondent. Had the last point been given due weight it is doubtful whether any opinion would have been rendered at all upon the proposition announced by the court.

His Honor recognizes the impossibility of attacking a land patent in an action at law, and asserts that

if the opinion of this court in the Calhoun-Ajax case is carelessly read without knowledge of or reference to the question there considered, it might seem to be broader than it really is, but that its careful examination does not support the view contended for by the petitioner. His Honor then announces what he terms "radical and controlling differences between the question presented in that case and the issue of law before us." These differences are numbered 1, 2 and 3 respectively in the opinion. The first is that the judgment of the land department allowing the entry of the petitioner was between the petitioner and the United States only, and thereby binding upon them and their subsequent assignees; that the respondent was not, and was not required to be, a party to that proceeding and therefore not bound by the action of the department in allowing the entry and issuing patents. Its rights then were too "uncertain, contingent and intangible" for determination.

"When the applications for the patents of the lode claims were filed, the blind veins which have induced the use of the tunnel through the lands in controversy had not been discovered, the tunnel had not been driven into the land, and it was impossible to know whether or not the claimant of the tunnel site would ever acquire any right to use the land for the purpose to which it is now devoted."

The facts recited in the above quotation from the learned judge's opinion are not altogether warranted by the record. It contains no recital justifying the statement that when the petitioner's applications for patent were made the tunnel had not been driven into the ground. For aught that appears to

the contrary, it may at the time of such applications have been extended entirely across petitioner's premises. The answer alleges that the tunnel entered the petitioner's westerly side line more than a year prior to the commencement of the action. This allegation is entirely consistent with the conclusion that it was driven at or before the application for the patent.

But if the respondent was exempt from the duty of adversing petitioner's application for patent because these rights are assumed at that time to have been "uncertain, contingent and intangible," we venture to inquire in what respect they have changed so far as the petitioner's premises are concerned since that time. It has absolutely no claim to anything in the petitioner's ground. It has admitted in its argument before the Court of Appeals that *it has no right to the lodes upon which the petitioner's claims were located*, and that it has discovered no veins therein. If these rights were then "uncertain, contingent and intangible," have not the subsequent developments demonstrated the existence of no rights whatever, contingent or otherwise? Respondent has, contrary to the petitioner's will and against its consent, explored the petitioner's premises for the entire length of its tunnel through them. It has found nothing. Its "intangible rights," whatever they may be, have been demonstrated to be non-existent in law or in fact. Can it, therefore, have any standing in a court of law or equity which can justify its attempted attack on petitioner's patent, either directly or indirectly, except on the hypothesis that, having trespassed on and found no vein within our territory, it may use its tunnel for exploration elsewhere?

Let us assume that the respondent, after crossing petitioner's territory and before intersecting a vein elsewhere, had been proceeded against in ejectment. Would its right have been any more certain and tangible then than it was at the time of the patent application, and can it be that it was relieved from the necessity of adversing our patent application because these rights were nebulous and contingent, but can now assail our title and the period of our discovery when its so-called right is no longer intangible and contingent, but has been demonstrated by development to have been without foundation *ab initio?*

We can understand how a senior tunnel location which has not penetrated a junior lode location can lose nothing by failure to adverse the latter's application for patent and then assert a right against it growing out of the discovery by the tunnel of a blind vein within the premises of the patented junior location. We can not perceive, however, any right of the tunnel claimant even under such conditions to attack the patentee after demonstrating by the exploration of its tunnel that no blind vein whatever exists within the vertical boundaries of the patented premises, but the Circuit Court of Appeals under far less favorable circumstances has determined that *a junior tunnel location entirely barren in its course across intervening patented claims senior to the time of its location may assail the integrity of the patent by denying its location upon the discovery of any mineral vein prior to the date of its entry.*

The second distinction asserted by His Honor between this and the Calhoun-Ajax case is that in the latter case the discoveries in the lode claims were nec-

essarily considered and adjudged by the land department to have been made before the location of the tunnel site, and that such finding was indispensable to the decision that the lode claimants were entitled to make the entries, as the location of the tunnel site was subsequent to the entries, and hence the finding that the discoveries were made before the entries was necessarily a finding that they were made before the location of the tunnel site, and was binding, therefore, upon the claimant of the tunnel site. This His Honor says is not true in the present case. "The question here is whether or not discoveries were made in the lode claims prior to January 13, 1892, the date of the location of the claim to the tunnel site. The determination of this question was neither indispensable nor material to the adjudication made by the land department on August 5, 1892, that the lode claimants were entitled to enter the land, and there is nothing to show that this issue was ever considered or decided by the department in reaching its conclusion. The only question relative to the discoveries that it was required to determine was whether or not they had been made prior to *August 5, 1892*, when the entries were permitted, and the decision of that question left entirely untouched the issue in this case, whether they were made before or after the location of the tunnel site on January 13, 1892."

The entry, as a matter of fact, was made on the 5th day of August, 1893 (Transcript, page 138). This discrepancy, however, is not controlling, and may be an error of the reporter. The important feature of the so-called distinction of the Court of Appeals is that in the Ajax case it is solemnly declared that a finding

by the department that discoveries had been made before the date of the entries of the lode claims was indispensable to the decision that the lode claims were entitled to make such entries. If such a decision was indispensable to such a view in that case, such a decision was equally indispensable to such a view in this case. In each instance the finding must have been that the discovery preceded the entry, and in each instance the decision is binding as to all the world. If the tunnel claimant in that case could not go behind the entry, how can the tunnel claimant in this case go behind it, except it be determined that a decision admitting the entry was indispensable there and of no consequence here? It is no answer to this query to say that the respondent was limited in his proof of non-discovery to the time between the two locations. It has contended for no such limitation, and there is nothing in the logic of the court's decision to warrant it. The necessary consequence of the doctrine is that in the case at bar the respondent may roam over the entire period between the location of our claims and their entry for the purpose of showing no discovery. If that can be done, we see no reason why the entry should be given any significance whatever; for, if it be true, as stated by Judge Sanborn's first contention, that the judgment of the land office in permitting the entry and patent is not binding upon the respondent, which was not and was not required to be a party to that proceeding, it must follow that the respondent can, notwithstanding such judgment, show, if the fact be so, that there never was any discovery of a mineral vein in either of the petitioner's claims between the date of their location and the commencement of

the suit. For if such a judgment does not bind respondent, which was not a party to it, its freedom from the judgment is as perfect after the entry as before it.

His Honor's third distinction between the two cases is:

"That when the entries were made in the Ajax Gold Min. Co.'s case no claim to a tunnel site had been located or staked upon or across the lode claims; and the entries of them, and the patents to them vested the title in the claimants free from any right or claim to a tunnel site. It is otherwise in the case at bar. The claim to the tunnel site was located and staked out across these lode claims before they were entered. Under the revised statutes and the law the entries and patents of these claims vested the title to them subject to the right of an owner of an adjoining lode claim to follow on its dip through a side line and through the patented territory of these lode claimants any vein which has its apex in his claim. While, therefore, it is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests, it is no such attack to assert the rights of the claimant of a tunnel site located before the entry of the land against the patent of it to a lode claimant, because under the statutes and the law such a patent always issues subject to those rights."

We deny both the premises and the conclusion involved in this statement. If they embraced a correct exposition of the law, section 2322 of the Revised Statutes of the United States has been construed in vain for the past thirty years. The patent can not be contracted beyond the exceptions expressly contained within its recitals. Our patent gives us, both under the provisions of that section and the decisions of this

court, the particular vein patented, and all other veins the tops or apices of which are included within the exterior boundaries of our location. The right of an adjoining owner to follow his vein on the dip through the side line grows out of the patent to that claim and of the location of the apex of the vein within it, and rests upon the exception expressly inserted in all lode claim patents. The tunnel claimant, on the other hand, asserts the right, notwithstanding our preceding location, to every vein apexing within our claim and not appearing at the surface which his tunnel may encounter, notwithstanding the seniority of our location; and in spite of the patent is is conceded the right by the Court of Appeals to attack its validity up to the very hour of the entry thereof. Every argument upon which this remarkable proposition is based, if sound, justifies its right to attack our patent down to the hour of trial and irrespective of the entry. The latter either binds the respondent or it does not. If it is binding, then the entry takes effect by relation back to the date of location. If it is not binding for the reasons given by His Honor Judge Sanborn, it may be swept aside whenever the interests of the respondent may require it.

His Honor, again misquoting the averments of the respondent, "that no discoveries were made in the lode claims until after the location of its claim to the tunnel site," argues that "if this allegation is true, it may be doubted whether the lode claims can be said to have been initiated before the claim to the tunnel site was located," and then cites a number of authorities in support of the proposition that there can be no location of a mining claim until the discovery of a vein

within its limits. The "allegation" can not be true, because the averment does not appear in the pleadings, but if it were made, and if it were true, a patent having issued for the premises, relieves the location of all vulnerability whether it was located upon a vein discovered previous to location or not, and the argument of the Circuit Court of Appeals again fails.

His Honor assures us that if this litigation had arisen prior to entry the question of discovery would be decisive, and then asks what there is in the entries and patents to deprive the defendant of the right to try this issue now upon like evidence? We answer the patent itself, and the date of our location as compared with that of the respondent's tunnel site, which by the patent is conclusively established as the date of discovery. If there is nothing "in the entries and the patents to deprive the defendant of its right to try these issues now upon like evidence," it must follow that the entries and patents are of no consequence and the defendant ought not to be confined in his proof to the date of his entry. If the Court of Appeals' decision be sound, and the petitioner's claims were eleven years instead of eleven days older than respondent's tunnel site, during all of which time it had been in possession, and after the expiration of which time we had made our application and entry, the claims would still be subject to respondent's assaults. Such a doctrine is repugnant, not only to the sense of justice, but every decision of this court pertinent to the subject.

THE CALHOUN-AJAX DECISION.

The decision of this court in the case of The Calhoun G. M. Co. vs. The Ajax G. M. Co., 182 U. S., 498, is conclusive of every question in this case. The trial of the case at bar was intentionally postponed by the petitioner until that decision was announced. It arose between litigants owning property in the same mining district, and its importance was appreciated not only as affecting this but many other controversies then pending or threatened throughout the state of Colorado. The Circuit Court conducted the trial in strict conformity with its principles, and the distinction drawn by the Court of Appeals between the two cases may have been imagined, but was not presented to the consideration of the trial judge. A comparison of Mr. Justice McKenna's opinion with that of His Honor, Judge Sanborn, will fully justify the charge of their hopeless conflict and the consequent violation of the former by the latter. The facts constituting the Calhoun-Ajax controversy and appearing on pages 502 and 503 of the report, are identical with those now before us, except that the blind or cross veins there contended for were within the boundaries of the lode locations crossed by the tunnel, and except also that the tunnel location was there made after the entry of the claims and before their patent, while here it was made after the lode locations and before their entry. The first distinction is important in that nothing is or can be claimed by respondent here against petitioner except the right of way through its premises. The second distinction is one, we submit, that is wholly without foundation in

law. It was not alluded to in the opinion of this court, nor is the latter limited, either by expression or construction, to conditions peculiar to the case itself.

In the Ajax case four propositions were considered. The third is unimportant here. The others are, first:

"First. Whether the entry of a tunnel claimed by plaintiff in error is entitled to a right of way through the defendant in error's lode claims. Second. Whether or not plaintiff in error has acquired by virtue of such tunnel site location and ownership a right to the possesion of blind lodes cut therein, to wit: veins or lodes not appearing at the surface and not known to exist prior to the date of the location of said tunnel site. Lastly. Whether or not plaintiff in error should have been allowed to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl lode claims prior to the location of said tunnel site."

The two questions to be here determined are practically identical to those numbered one and four in the Calhoun-Ajax case. They may be stated as follows:

First. If a lode claim has been patented under section 2322, does section 2323 modify the preceding section and give claimants of tunnel sites located subsequent to the location of the lode claim a right of way through such lode claim for any purpose?

Second. To what date does the patent to such a lode claim relate; to the date of such location, or can the tunnel claimant fix the same by parol testimony without reference to such patent?

This court in the Calhoun-Ajax case, page 507, says that the assignments of error mentioned relate to rights

"claimed by the plaintiff in error by the location of a tunnel site and presented the question whether such location gave to the plaintiff in error the following rights: A right of way through the lode claims of the defendant in error, and the possession of the blind veins cut by the tunnel underneath the claims of the defendant in error.

"Plaintiff in error asserts a right of way for his tunnel under Section 2323 by implication, and from that implication and the rule it contends for as to cross veins, deduces its right to all of the blind veins. The contention as to cross veins we have answered, *and the deduction as to blind veins is not justified.* The section contemplates that tunnels may be run for the development of veins or lodes; for the discovery of mines; gives the right of possession of such veins or lodes, if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. *There is no implication of a displacement of surface locations made before the commencement of the tunnel. Indeed, there is a necessary implication of their preservation, and there can be no implication of a conflict with the rights given by Section 2322. The exclusiveness of those rights we have declared. A tunnel can only be run in subordination to them. How else can Section 2322 be given effect? There are no exceptions to its language.* **The locators 'of any mineral vein, lode or ledge' are given not only 'an exclusive right of possession and enjoyment' of all the surface included within the lines of their locations, but 'of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' A locator, therefore, is not confined to the vein upon which he based his location and upon which the dis-**

covery was made. 'All veins or lodes having their apices within the planes of the surface lines extended downward are his, and the possession of the surface is possession of all such veins or lodes within the prescribed limitations.'"

The court, quoting from Campbell vs. Ellet and Del Monte Co. vs. Last Chance Co., continues:

"The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defendant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on the statutes of Colorado, it is disposed of by their interpretation by the Supreme Court of Colorado."

The last proposition was briefly and tersely disposed of by the court:

"An assignment of error is based upon an offer of plaintiff in error to prove, that at the time of the location of the Ithaca Tunnel site, no ore had been discovered in two of the patented claims of the defendant in error, to wit: the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the location of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

We find here no strained inferences or the use of any language justifying the establishment of a distinction between cases where tunnel sites were located after lode mining claims and those where tunnel sites were located after the mining claims were entered. It is not here said that the patents were proof of discovery and related back to the date of entry, but to the date of locations. Nor is it inti-

mated that some patents have such relation and that others have not. Yet the Court of Appeals has said, notwithstanding this decision, that the petitioner's patents do not relate back to the date of the location, but to some time or any time to be fixed by parol testimony prior to the date of entry, and that the respondent has a right of way through the petitioner's property notwithstanding his patents, merely because it located its tunnel before we entered our claims. As illustrating the uncertainty involved in that decision, we may be pardoned for asking whether proof as to the discovery of mineral would be admissible against petitioner up to the very day or the very hour before the entry was made. If the right exists, what infinitesimal period of time could be fixed by the court preceding the entry within which a patent is invulnerable and prior to which it is subject to attack. If it is true that a patent when granted relates back to the date of location, no attack can be made upon the title of the claim between that date and the date of entry without involving an attack upon the patent. If it relates back only to the date of entry, then the patent only grants a fee apparently indisputable to that date. But prior to that date the location covered by it is as open to assault as though no patent had been issued for it, and if the assault is successful the patent is as completely overturned as though it related to a time subsequent to the entry. Such a rule would mean that the government only grants a fee in form which may be absolutely worthless by reason of the existence of tunnel claims located across it fifteen minutes or fifteen months before its entry. The government gives us a patent to mineral lands because of our compliance with its laws. Its officers, in grant-

ing a patent, pass upon the application which is only conclusive from the date of the entry, although it is assumed to be conclusive from the date of the location. It is subject to attack from parties like the respondent up to the date of the entry, notwithstanding the patent, and yet we are gravely assured that this does not involve a collateral attack upon the patent. If this be the law the respondents might have made a lawful tunnel location across the petitioner's mining claims after its posting and publication of notice of application had expired, after every step required in the securing of patent save making the entry had been complied with, and after the government itself, under its own regulations, could not refuse the grant.

It is true, as the Circuit Court of Appeals suggests, that a location certificate of a mining claim is not conclusive proof of the facts which it recites against those asserting rights adversely to its maker, but the rule is applicable only to claims which are unpatented. It is equally true that when a patent is legally and regularly obtained upon and under such location certificate by compliance with all of the requirements of the federal law and the department regulations, it relates back to such location and then takes effect whereby the recitals of such location certificate are practically made conclusive. We recall no expression of this or any other court to the contrary.

The only possible theory of the Calhoun-Ajax case that harmonizes with the decision here is to assume that by the former it was determined that a patent when issued takes effect only from the date of entry instead of the date of location; but this would

be to decide that there was no relation whatever, since the entry is virtually the patent itself. *To say that the actual time of discovery instead of the date of the location is the time at which the patent takes effect is to say that by parol proof it might be made to take effect subsequent to its date, for the evidence might so determine. On the other hand, such evidence might show that no discovery was ever made. In that event, would it be said that the government title was of no effect whatever?*

His Honor, Judge Sanborn, says: "It is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests," but that "it is no such attack to assert the rights of the claimant of a tunnel site located before the entry, because, under the statutes and the law, such a patent always issues subject to those rights." We have heretofore challenged the soundnes of this statement. If it be true, a tunnel claimant may make a location of his tunnel within an hour prior to the lode entry and thereby make an attack upon it that is not flagrant but lawful. If he delays two hours and then attacks, his action is flagrant. Is it not clear that by this decision the doctrine of relation is not modified, but destroyed? The entry is the title. The patent merely evidences it. It is meaningless to say a patent relates to the entry, for that is its date. If it is to relate at all, it must go back to an earlier time. His Honor concedes this, but nevertheless declares it open to attack under certain conditions at any time prior to entry. It seems remarkable that if this decision is the law, the distinction between entry and location, as affecting the integrity of a patent and its conclu-

siveness or otherwise as to the regularity of all antecedent requirements, was not announced long ago.

It must not be overlooked that the respondent's contention, if sustained and followed by proof to support it, which we do not concede, does more than postpone the effect of the patent to the date of entry. It might rob it of all its value; for, if the respondent can prove that the discovery was not as stated in the location certificate and confirmed by the patent, it can, if the facts should warrant, establish its own right to the ores in the claim. Of what avail are the provisions of section 2322 against which "no implications can be made, of what value is petitioner's title to the surface, if its ores may be appropriated by another? Of what moment is the sanctity of its patent if the thing for which it was granted can be taken with impunity by one who has no patent and merely asserts a tunnel location younger than the lode claim but older than the entry?

The case of the Rico-Aspen Co. vs. Enterprise M. Co., heretofore referred to, does not support the respondent's contention. The group tunnel was there located and recorded long prior to the location and discovery of the Vestal lode claim. Besides, *the latter did not cross the line of the tunnel location, but was parallel to and five or six hundred feet away from it.* The Vestal vein presumably ran with the claim, so that the tunnel never could intersect it. A blind vein cut by the tunnel crossed the Vestal at right angles, and the ownership of that vein within the Vestal boundaries was the point in controversy. The court held that the tunnel, being older than the lode claim, and not even crossing it, was, under the federal statutes, entitled to the mineral in the blind vein. It did not

intimate that the Vestal patent did not relate back to its location, but merely that the tunnel, being older in date, was older in right to the blind cross-vein discovered in the tunnel. It is true that this court there held that the senior tunnel claimant need not adverse a junior lode claim patent application, especially where there was no surface conflict; but if the tunnel be the junior location and the senior lode location directly across its line apply for patent, should not the former, if it believes the latter to be void for want of discovery of a vein therein, prevent its entry by adverse or protest? (See Tioga M. Co., 8 Copp L. D., 88; Bodie Tunnel Co. vs. Bechtel Con. N. Y. Co., 1 L. D., 584.)

It will be recalled that subsequent lode locations along a tunnel site are invalid only as to veins "not previously known to exist discovered in such tunnel;" in other words, "veins or lodes not appearing on the surface." (R. S., U. S., 2323.) Nevertheless this recital necessarily involves, as was said by this court, the recognition of such locations as were made previous to the location of the tunnel, not only as to those apexing at the surface, but as to all other veins, lodes or ledges existing therein.

The effect of the Court of Appeals' decision, apart from its conflict with that in the Ajax case, will, if sustained, be far-reaching. Of course, if it is correct, its consequences will not deter this court from affirming it. On the other hand, such consequences may become important should any doubt exist as to its correctness. It will expose the validity of every patent to attack by every tunnel location across their boundaries prior to entry, thereby unsettling titles, threatening vested rights in every mining district in the West, and

by departing from the salutary doctrines of this Honorable Court will bring disquiet and contention to many holders of mining patents throughout the mining regions.

We respectfully submit that the opinion of this court in the Ajax case settles the petitioner's right to its premises, concludes the position of the respondent as to a right of way across the petitioner's premises, and forever estops it from assailing either petitioner's patent or the date upon which it took effect. That the decision of the Court of Appeals is in conflict with such decision, finds no support either in the statutes or any of the opinions of this court, introduces a vicious principle into the law of patents, unsettles titles, exposes their holders to needless and expensive litigation, and their land to constant entry and occupation by so-called tunnel claimants; offers a premium for the location of bogus tunnel claims, provokes litigation, and above all unsettles and confounds titles held by citizens under the laws of the United States. We ask that the decision of the Court of Appeals be reversed, and the judgment of the trial court affirmed.

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